

**Summary of Comments and Response to Comments
on Proposed Amendments to**

310 CMR 7.28

NO_x Allowance Trading Program

to establish the

Public Benefit Set Aside Allocation Process

and

Proposed Revisions to the

State Implementation Plan for Ozone

Regulatory Authority:

M.G.L. c. 111, Sections 142A through 142M

June 2004

On April 5, 2003, the Department of Environmental Protection (DEP) issued a notice of public hearings on proposed amendments to 310 CMR 7.28, NO_x Allowance Trading Program, and on proposed revisions to the Massachusetts State Implementation Plan (SIP) for ozone. The amendments to the State's NO_x Allowance Trading Program establish the process for allocating allowances from the Public Benefit Set-Aside (PBSA) account created under 310 CMR 7.28, as promulgated in 1999. The amendments also modify 310 CMR 7.28 to make it consistent with federal requirements at 40 CFR Part 75 concerning continuous emissions monitoring. The ozone SIP will be revised to include the revised regulation following its promulgation.

DEP held two public hearings on the proposed regulatory amendment and SIP revision: one on May 7, 2003, in Springfield, Massachusetts and one on May 8, 2003 in Boston. Written comments were accepted through May 19, 2003. This Response to Comments document responds to oral and written comments received during the public comment period. DEP appreciates the input from those who commented at the public hearings and those who submitted written comments. Those who provided comments are listed below; all comments were provided in writing unless otherwise noted. (Commenters are identified in this document by the three-letter abbreviation following each name.)

- Applied Resources Group (ARG)
Richard D'Aquanni, P.E.
- Energy Management, Inc. (EMI)
Mitchell Jacobs
- Boston Carbon Corporation (BCC)
Sheldon M. Wool; Executive Vice President
- MASSPIRG (ENV)¹
Frank Gorke; Energy Advocate
- Clean Water Action (ENV)
Cindy Luppi; Organizing Director
- Conservation Law Foundation (ENV)
Seth Kaplan; Senior Attorney
- Nuclear Energy Institute (NEI)
Richard J. Myers; Senior Director, Business
- Entergy Nuclear Generation Company: (ENT)
Brent Dorsey, Senior Manager, Entergy Nuclear, Inc.
(oral and written comments)
Elise N. Zoli, Goodwin Proctor LLP
- Conservation Services Group and CSG Services (CSG)
Jennifer Lange
- Massachusetts Technology Collaborative (MTC)

¹ MASSPIRG, Clean Water Action and Conservation Law Foundation submitted one joint comment letter.

Mitchell Adams, Executive Director

- Massachusetts Renewable Energy Trust (RET)
Karlynn Cory (oral comments)
- RJ Associates (RJA)
Robert Machaver
- U.S. Environmental Protection Agency (EPA)
Michael Kenyon
- GDS Associates (GDS)
Tom Rooney, Project Manager (Comments were submitted after the deadline, but have been addressed.)

Comments and responses have been grouped according to the following categories and issues:

- A. Definition of REP – Massachusetts connection
- B. Qualifying Projects – Nuclear
- C. Qualifying Projects – Start year
- D. Qualifying Projects – Steam, thermal, combined heat and power
- E. Quantification of EEPs – Per unit output
- F. Quantification – Small projects
- G. Quantification of REPs – NEPOOL metering
- H. Quantification of EEPs – Baseline year
- I. Quantification – Use of multiplier
- J. Allocation Rate Adjustment
- K. Certification
- L. Reallocation of Unused Allowances
- M. Non-PBSA Related Comments: Data Submittal Deadline/Allocation Distribution Date
- N. Other Comments
- O. New Timeline
- P. Responses to DEP Questions
- Q. Caveat Regarding Use of Allowances by REPs

A. DEFINITION OF RENEWABLE ENERGY PROJECT – Massachusetts Connection

COMMENT: The definition of Renewable Energy Project (REP) should be clarified to make sure that the facility is generating renewable energy and that it is available to Massachusetts. The current language could be misinterpreted to mean that the generation unit produces renewable energy, OR is located in MA, OR is directly connected to the Massachusetts Pool. (MTC)

RESPONSE: DEP agrees and has clarified the definition.

COMMENT: The proposed definition of REPs includes units “directly connected to pool transmission facilities located in Massachusetts.” The commenter suggests that the word “pool” be deleted from the definition of REP. The commenter notes that many smaller projects and intermittent resources can’t

connect directly to the very large pool transmission facilities. Including generating facilities located in Massachusetts or delivering the power directly to Massachusetts fulfills the intent that power be delivered directly to Massachusetts. (EMI)

RESPONSE: DEP agrees and has modified the definition. DEP has also restricted the eligibility of facilities located outside of Massachusetts to those that are “solely” connected to transmissions facilities in MA to clarify that facilities that connect to transmissions facilities in other states are not eligible for MA PBSA allowances.

B. QUALIFYING PROJECTS – Nuclear

COMMENTS: (1) DEP should add another category for “NOx-free generation” to the public benefit set-aside (PBSA) to include nuclear power. (ENT) (BCC) (2) The proposed amendments should be changed to include as eligible recipients of PBSA allowances, all non-emitting sources, including incremental production of electricity from nuclear power plants. (NEI)

RESPONSE: DEP disagrees with these comments. The final regulation, like the draft that was issued for public review, limits PBSA eligibility to energy efficiency projects and renewable energy generation and excludes nuclear power from the definition of renewable energy.

DEP’s establishment of two categories of PBSA-eligible projects – energy efficiency and renewable generation - is consistent with the Massachusetts Electricity Restructuring Act (M.G.L. c. 164). In 1999, following DEP’s issuance of a draft of the NOx Trading Program regulation, 310 CMR 7.28, DEP responded to comments concerning the relationship between the PBSA and the Electricity Restructuring Act as follows:

“DEP strongly believes that the Public Benefit Set-Aside is consistent and complementary with the Massachusetts Electricity Restructuring Act. Several provisions in the Act indicate that the legislature has an interest in supporting the growth of the energy efficiency and renewable energy industries in Massachusetts in order to capture important environmental benefits and local economic gains for the Commonwealth. DEP expects that the effective administration of the Public Benefit Set-Aside will provide a meaningful and complementary role to programs initiated through the Act’s provisions.” *Summary of Comments and Response to Comments From Public Hearings on Proposed Revisions to the State Implementation Plan for Ozone, Including Proposed 310 CMR 7.28* (undated) p.12.

The definitions of eligible energy efficiency and renewable energy projects that have now been added to 310 CMR 7.28 pursuant to this amendment maintain consistency with the Electricity Restructuring Act. The exclusion of nuclear power from PBSA eligible projects is consistent with the Electricity Restructuring Act’s general support for energy efficiency and renewable energy technologies and with the Act’s specific exclusion of nuclear power from the definition of “renewable energy.” Establishing a third category of eligible projects – NOx-free generation – that would include nuclear power would be inconsistent with the Electricity Restructuring Act.

COMMENT: Any proposal to give additional allowances for nuclear power stations introduces the eventual possibility that energy efficiency and renewable energy projects may have to compete with nuclear power for NOx allowances and perhaps for other air pollution allowances as well. Any proposal that could eventually pit the mature and already well-subsidized nuclear power industry against a fledgling efficiency and renewables industry and force both sides to compete for subsidies simply make no sense. (ENV)

RESPONSE: DEP agrees that requiring the energy efficiency and renewables industry to compete with mature industries, such as nuclear power, for PBSA allowances is inconsistent with the purpose of the PBSA. As discussed in the previous response, the PBSA program seeks to reward energy efficiency and renewable energy technologies and projects that have not matured to the point where they can compete with existing electricity generation units on the basis of price alone. For example, technologies such as wind turbines and solar photovoltaics are immature renewable technologies that hold the potential for significant environmental and economic benefits in the future.

COMMENT: While fossil plants produce conventional pollutants such as NO_x, sulfur dioxide, fine particulates and a variety of toxic combustion products that impact human health and the environment over relatively short to intermediate time frames, nuclear plants mainly produce pollutants that are radioactive compounds and that impact human health and the environment over extremely long time frames. Because there is no way to compare the environmental harm caused by the two types of plants, there is no way to determine whether a NO_x emissions trading program that grants allowances to a power plant will produce equal or greater environmental benefits than a program that grants such allowances only to fossil plants. (ENV)

RESPONSE: DEP agrees with the commenter that fossil plants and nuclear plants generate different environmental impacts over different timeframes. However, DEP has not assessed the impacts of fossil fuel versus nuclear power generation for the purpose of establishing eligibility for PBSA. Rather, as noted in its Responses above, DEP's determination as to the ineligibility of nuclear power for PBSA allowances is based on consistency with the Massachusetts Electricity Restructuring Act and DEP's policy of promoting energy efficiency and renewable energy technologies and projects through the allocation of PBSA allowances.

C. QUALIFYING PROJECTS – Start year

COMMENT: (1) The rule should clarify the earliest year in which a project could have been implemented and still qualify for allowances. At a minimum, it is suggested that projects implemented back to 1999 be eligible. It does not seem equitable to preclude sources that had the foresight to initiate energy reductions projects early from benefiting. (RJA) (2) The program should provide for allocation of allowances for EEPs completed prior to 2002. (CSG)

RESPONSE: DEP agrees with these comments and has clarified in the final rule that only EEPs and REPs implemented subsequent to December 31, 1999 are eligible for allowances. DEP believes that limiting project eligibility to projects that were implemented after December 31, 1999 ensures that the PBSA account is providing an incentive for new projects initiated subsequent to the promulgation of 310 CMR 7.28 in 1999. Although projects implemented after December 31, 1999 are eligible for PBSA allowances, allowances will be allocated only for energy saved or generated in 2002 and subsequent years.

D. QUALIFYING PROJECTS – Steam, thermal, combined heat and power

COMMENT: The scope of eligible EEPs is much broader than the scope of eligible REPs. While the broader scope for EEPs will make many worthy projects eligible, it may also make implementation of the program by DEP more challenging. Energy is defined differently in the definitions of REP and EEP. Under the proposed definitions, only REPs that result in the production of electricity would be eligible for credit. REPs that result in heat or other forms of energy would not be eligible. In contrast, the EEP definition does not appear to be limited to projects that increase efficiencies in the generation or use of

electricity and can thus include other types of energy efficiency measures such as the reuse of waste heat in Combined Heat and Power (CHP) applications, or the upgrading of industrial boilers to make them more efficient. (EPA)

The language within the EEP provisions is somewhat inconsistent, in that the definition of EEP does not limit such projects to electricity, but the language at 310 CMR 7.28(6)(b)8. does appear to assume any efficiency project will involve electricity. (EPA)

Energy reductions that are achieved through steam efficiency projects as well as electrical efficiency projects should be eligible. The procedure for requesting energy efficiency allowances in the proposed rule at 7.28(6)(b)8. effectively restricts eligible projects to those that directly reduce electric energy. This approach severely restricts the range of projects that can benefit from this program, including many that clearly fall within the proposed definition of EEP. (RJA)

RESPONSE: DEP agrees that the draft regulation was unclear in that the definition of EEP was not limited to electric projects while the calculation of energy savings for EEPs was to be based on MWh. The draft regulation also excluded REPs that generate heat or forms of energy other than electric energy. In the final regulation, DEP has clarified the provisions related to EEPs to make it clear that projects other than those that save electrical energy are eligible and has expanded the definition of REPs to include non-electric projects.

DEP is supportive of Combined Heat and Power (CHP) and other thermal related energy efficiency projects that result in measurable and quantifiable reductions in energy usage. It also agrees that limiting renewable projects to strictly electrical generation would not provide an incentive for installation of renewable projects that have the benefit of upgrading older thermal energy systems. DEP limited the scope of eligible projects in the proposed regulation because of the staff time that would be required to review requests for non-electric projects. DEP believes that by providing general formulae in the regulation for calculation of allowances the review of requests for allowances for thermal projects can be standardized and therefore expedited. It has, therefore, expanded the definition of REPs to include projects other than electric projects and has made it clear that both thermal and/or electrical energy EEPs are eligible for allowances.

DEP has included formulae in the final regulation to address the energy savings or energy generation of non-electric projects. DEP has also referenced the International Performance Measurement and Verification Protocol (IPMVP) as guidance for requesting PBSA allowances. This document outlines the procedures an applicant should follow depending on the complexity of the project, and specifies how to measure and verify the accuracy of the energy reduction analysis.

COMMENT: DEP should allow projects that include: 1) installation of more efficient steam process equipment by the end user; and 2) insulation of steam lines at the end user; as well as efficiency improvements at the power plant that allow a boiler to produce greater amounts of useful steam per MMBtu of fuel combusted. (RJA)

RESPONSE: As stated previously, DEP is clarifying and expanding the definition of projects eligible for PBSA allowances in the final rule to incorporate both thermal EEPs and thermal REPs. (Steam is a form of thermal energy that could be a component of thermal EEPs and REPs.)

With respect to improvements at a power plant, DEP does not want to provide a double credit of allowances for a project on a budget unit that already does or will benefit from the receipt of allowances under the non-PBSA allocation program under 310 CMR 7.28. (There are currently 89 MA budget units that receive non-PBSA allowances.) Any energy efficiency measures undertaken on a budget unit will

result in a combination of: 1) a reduction in fuel usage and NOx emissions, so that fewer allowances will be needed for compliance; and 2) an increase in output relative to the pre-project fuel use, so that more non-PBSA allowances will be allocated to the unit. Consequently, DEP will allocate allowances for EEPs only for non-budget unit projects.

COMMENT: DEP should develop a conversion factor for converting any non-electric energy efficient project (EEP) into an equivalent electrical energy savings. (RJA)

RESPONSE: DEP has addressed this point by incorporating specific formulae into the regulation that account for energy savings for thermal improvements at a non-budget unit. These formulae include combined heat and power projects as well as other thermal based energy efficiency projects relative to a manufacturing process. An eligible manufacturing EEP is one where the product can be a pound of steam, a widget, or any final product that is manufactured using less energy than would have been otherwise achieved, by implementing a more energy efficient system including specific equipment, and/or a technology change.

E. QUANTIFICATION OF EEPs – Per unit output

COMMENT: It is suggested that in the definition of energy efficiency project, the phrase “or energy consumption per unit output” be added. A source should not be precluded from obtaining PBSA allowances if they implement energy efficiency projects and are more efficient on a per unit of production basis just because the overall demand for electricity or steam at the source has increased. (RJA)

RESPONSE: DEP agrees with the commenter and has added specific language and an applicable formula to award allowances for energy efficiency projects (EEPs) on a per unit of production basis.

F. QUANTIFICATION – Small projects

COMMENT: For smaller projects (≤ 10 tons), more flexibility in the selection of the quantification methodology should be allowed. Requiring the energy reduction quantification methodology to conform to rigid standards that may demand either a substantial verification effort or the contracting of a third party to perform verification activities could make the application process so costly as to offset the benefits of the received allowances. For smaller projects, alternative quantification methods would be acceptable based on standard engineering practices or procedures used to quantify energy savings for similar programs. (RJA)

RESPONSE: DEP agrees in part and disagrees in part. DEP agrees to the extent that a project will generate less than 5 allowances, other methods acceptable to DEP to determine the allowance allocation can be used and the regulation has been so modified. In such cases, if alternative methods reasonably equate with the methodology of an applicable formula, are quantifiable and replicable, then they can be used in lieu of the formulae cited in the regulation.

G. QUANTIFICATION OF REPS: NEPOOL Metering

COMMENT: The use of NEPOOL Generation Information System (NE-GIS) reports maintained by APX should suffice for NOx emissions from REPs for both NEPOOL and non-NEPOOL participants. If the REP is not participating in NE-GIS, the REP is likely to represent a small power plant. In this

situation, NEPOOL metering to ascertain MWh generation is inappropriate and prohibitively expensive. (ARG)

RESPONSE: REPs do not receive allocations based on NOx emissions, therefore use of this information from NE-GIS is not appropriate. If the commenter intended to suggest that MWh of generation documented in the New England Independent System Operator's (NE ISO's) data bases (which is subsequently transferred to NE-GIS) should be used, DEP agrees that the MWh reported to NE ISO should indeed be identical to the MWh used by the project in its PBSA application to DEP. However, the MWh available to DEP through NE-GIS are only for calendar quarter periods; as the May to September ozone season does not match up with calendar quarters, project proponents will need to submit net MWh generated to DEP in their PBSA application.

While DEP could obtain annual electric generation data from NE-GIS for project proponents choosing to use the 5/12 of annual generation option, DEP believes it is the responsibility of the project proponent to supply such information. In addition, since project proponents that choose to report ozone season generation must submit electrical generation data to DEP (as discussed above), requiring all proponents to submit such data treats all project proponents consistently. Therefore, DEP is requiring all project proponents to submit electric generation data.

With respect to the commenter's second point, the Department does not agree that the accuracy requirements of the regulation are inappropriate or prohibitively expensive. The regulation requires "meeting the accuracy requirements found in NEPOOL's Operating Procedure 18 "Metering and Telemetering Criteria" or successor, or other metering equipment acceptable to the Department." This imposes accuracy requirements but does not require installation of expensive telemetering equipment. It also permits facilities to propose use of other metering equipment or methods. Other metering equipment or methods used for energy output measurements should conform to any practical and recognized industrial standards such as those furnished by the American National Standards Institute, Inc. (ANSI), American Society for Testing and Materials (ASTM), Institute of Electrical and Electronics Engineers, Inc. (IEEE), U.S. Environmental Protection Agency (EPA), or the National Institute of Standards and Technologies (NIST).

H. QUANTIFICATION OF EEPS - Baseline year

COMMENT: The rule should explicitly indicate that the baseline year for a particular project is fixed. (RJA)

RESPONSE: DEP agrees, and has modified the regulation to state that for purposes of determining energy savings from an EEP, the energy consumed in any one of the three years before a project begins is the baseline for calculating the energy savings. Allowances may be requested for up to seven subsequent consecutive years for each EEP. In each subsequent year the savings will be compared to the same selected baseline year.

I. QUANTIFICATION: Use of multiplier

COMMENTS: The formula proposed should include a multiplier of between 1.4 and 1.6 to account for transmission and distribution electric losses, power plant waste, and the need for power plants to run to provide spinning reserves. (ARG) An adder to the energy savings values should be included to account for electrical line losses and spinning reserve. (GDS) (Note: spinning reserves allow additional power generation to come on line rapidly in response to sudden increases in demand).

RESPONSE: DEP considered this issue in the original promulgation of 310 CMR 7.28, when it decided to allocate allowances on the basis of net output from facilities. Basing allowance allocations on net output encourages energy efficiency at the power plant by creating an incentive to reduce on-site energy consumption. Using a multiplier would convert net generation quantities to gross generation, eliminating the incentive to improve generation efficiency. DEP intends to continue the net output approach with the PBSA allocation and therefore is not modifying the regulation to include a multiplier.

J. ALLOCATION RATE ADJUSTMENT

COMMENT: Adopting the same basic 310 CMR 7.28 allocation rates of 1.5 lb/MWh for electricity and 0.44 lb/MMBtu for steam to distribute PBSA allowances seems reasonable. However, DEP might consider specifying this allocation scheme in a manner that allows adjustment of the allocation rate to further encourage participation in the event applications are limited. (RJA)

RESPONSE: DEP agrees that these allocations rates are appropriate for allocating allowances for REPs. As stated above, general formulae for EEPs have been incorporated in the final regulation consistently measure the energy savings of these projects and to ensure that applications can be reviewed efficiently

DEP disagrees with the suggestion that the allocation rate should be adjusted to further encourage participation. If participation is low in any one year, the regulation provides for banking of unused PBSA allowances for future year PBSA allocations, thereby encouraging participation. DEP may adjust the allocation rate in the future if it becomes necessary to provide further encouragement.

K. CERTIFICATION

COMMENTS: (1) Mechanical or electrical engineers registered in Massachusetts should attest to the information submitted, rather than a “responsible official.” The “responsible official” may need professional assistance in a number of areas such as normalization of weather, interactions between waste heat and AC and heating loads. (ARG) (2) DEP should consider listing the Certified Energy Manager and a Certified Measurement and Verification Professional as appropriate third parties for sign-off of the quantification of energy savings. (GDS) (3) For 100% privately funded energy efficiency projects, DEP should require that an energy engineer with a PE certify the analysis of energy savings. For utility-based, ratepayer-funded programs, Department of Telecommunications and Energy (DTE) utility cost-effectiveness analyses should be accepted as verification of energy savings for these projects. (CSG)

RESPONSE: DEP disagrees with the comments that an engineer’s certification should be required. The regulation requires that energy saved or generated be quantified in accordance with methods set out in the regulation and that a responsible official certify that the quantification is accurate and complete. DEP will then review the quantification in the application. It believes that these steps will provide adequate assurance that the energy saved or generated has been quantified appropriately. Requiring a mechanical or electrical engineer certified in MA or an energy engineer with a PE to make the required certification would impose an unnecessary and potentially burdensome cost on applicants. While DEP does not disagree that a qualified and experienced engineer may provide valuable assistance to some applicants, it does not believe that this assistance should be required.

With respect to utility-based, ratepayer-funded projects, DEP will review all information submitted to it including DTE cost-effectiveness analyses. It may accept such analyses as verification of energy savings for these projects, if after review of the request and the relevant analysis it concludes that this is appropriate.

L. REALLOCATION OF UNUSED ALLOWANCES

COMMENT: Rather than allocating banked allowances in excess of 10% of the total Massachusetts NOx trading budget to existing budget units, allowing the number of banked allowances to grow may provide a greater incentive for future renewable and energy efficiency projects. This is particularly the case for large-scale renewable projects that may take several years to permit and construct. In the future, Massachusetts could consider expanding the allocation of allowances for additional NOx reductions, such as from controls on mobile sources. (EPA)

RESPONSE: DEP has not changed the proposed regulation to allow the number of banked allowances to grow without being reallocated as suggested by the commenter. In 1999, when DEP proposed 310 CMR 7.28, the NOx Allowance Trading Program regulation, it received a number of comments concerning the banking of allowances and the reallocation of banked allowances. At that time DEP concluded that the reallocation of banked allowances down to 5% of the state budget when they exceed 10% of that budget provides a reasonable balance between the interests of existing budget units and the interests of PBSA eligible projects. DEP continues to believe that this is a reasonable approach.

COMMENT: The provision in 310 CMR 7.289(6)(b)4. that provides for the re-allocation of unused PBSA allowances should be revised so that this distribution is based on net output data for the previous control season. (RJA)

RESPONSE: The Department agrees that timely redistribution of unused allowances is appropriate, and therefore will change the last words in 310 CMR 7.28(6)(a)3. and (6)(b)5. to read "...output for the previous calendar year."

M. NON-PBSA RELATED COMMENTS: Data submittal deadline; Allocation distribution date

COMMENTS: DEP should revise 310 CMR 7.28(13)(e) to change the annual submissions deadline for providing net electrical and useful steam output data from October 15 to October 30 to be consistent with other quarterly submittal deadlines. (RJA)

RESPONSE: DEP agrees that encouraging consistency with other submittal deadlines is appropriate, and has therefore revised the output-reporting deadline from October 15 to October 31.

COMMENT: It would be helpful if the allocation of allowances could be made earlier in the year. It is suggested that allowances be placed into NATS accounts by 10/15 or 10/30 rather than 11/15. Since final true-up must be completed by 11/30, not having the allowances available until 11/15 can make it difficult to optimally utilize the allowances by 11/30. (RJA)

RESPONSE: DEP agrees that making allowances available earlier is preferable and has moved the allocation date up to November 1 of each year. However, DEP staff will strive to allocate allowances earlier than November 1, if possible. Also, see NEW TIMELINE, Section O.

N. OTHER COMMENTS

COMMENTS: A number of commenters expressed their general support for the amendments to 310 CMR 7.28. (CSG, ENV, ENT, MTC, BCC, RET)

RESPONSE: DEP appreciates these comments.

O. NEW TIMELINE

In the draft regulation issued for public review and comment in April 2003, DEP proposed that in 2003, requests for PBSA allowances would be submitted by August 1 and that in 2004 and subsequent years, requests would be submitted by July 1. DEP also proposed that by October 15th of each year it would provide a preliminary determination of the number of allowances that would be allocated to each project and that by November 15th of each year, it would allocate current year allowances.

Because DEP did not issue the final regulation within the timeframe it contemplated when the draft regulation was issued for public review in April 2003, it has revised the timeline for submission of requests and allocation of allowances. The final regulation provides that requests for and allocations of PBSA allowances will now take place according to the following timeline:

Calendar Year 2004:

Requests for 2003 and 2004 allowances are due by September 1, 2004. Year 2003 allowances will be allocated based on energy saved or generated by a project in 2002. Year 2004 allowances will be allocated based on energy saved or generated by a project in 2003. DEP will make the allocations of 2003 and 2004 allowances by November 1, 2004.

Calendar Year 2005 and later:

Requests for 2005 and subsequent year allowances are due by April 1 of the same calendar year as the designated year of the allowance. Year 2005 allowances and allowances for each subsequent year will be allocated based on energy saved or generated in the calendar year preceding the designated year of the allowances. DEP will make allocation allowances by November 1 of the designated year of the allowance.

As noted in Section C. Qualifying Projects – Start Year, projects that have been implemented after December 31, 1999 are eligible for PBSA allowances. Projects cannot receive allowances for energy saved or generated prior to calendar year 2002, however. Consequently, an EEP or an REP started in January 2000, for example, will not be able to receive PBSA allowances for energy saved or generated in 2000 and 2001. In the case of an EEP, given that an EEP can receive allowances only for the seven consecutive years immediately following implementation of the project (See Section H. Quantification of EEPs – Baseline Year, and 310 CMR 7.28(6)(b)10.e.), an EEP started in January 2000 would only be able to receive 2003 through 2007 allowances based on energy saved in 2002 through 2006. (Unlike an EEP, an REP is not deemed to have a “useful life” of seven years or any set period and can receive allowances for as long as it is producing energy.)

P. RESPONSES TO DEP QUESTIONS

In the Background Document and Technical Support Document issued with the draft regulation, DEP requested comments on the questions set forth below. Comments received in response to these questions and DEP’s responses to the comments are as follows:

- *Whether DEP should allow the earning of allowances based on generation or savings during the ozone season, if the data is available, and if the data is not available, based on annual data, multiplied by five-twelfths.*

COMMENT: A calculation based on annual data multiplied by five-twelfths is appropriate as many projects are monitored on an annual rather than monthly basis. (CSG)

RESPONSE: DEP agrees and has retained the option of calculating allowances based on annual data multiplied by five-twelfths in the final rule.

- *Whether DEP should use an emission factor of 1.5 lbs/MWh to allocate allowances or use a higher or lower emission factor.*

COMMENTS: (1) Supports use of 1.5 lbs/MWh. (CSG) (2) Supports the emission factor but suggests that DEP consider adjusting this rate if applications are limited. (RJA)

RESPONSE: DEP agrees and has retained the rate of 1.5lbs/MWh for electrical output. In response to the comment that DEP should provide for adjusting the rate if applications are limited, see Section J – Allocation Rate Adjustment.

- *Whether DEP should use seven years as the average useful life of an EEP or whether another period of time is more appropriate*

COMMENTS: (1) Supports conservative seven-year average useful life for EEPs. While most EEPs have a useful life that exceeds seven years, the seven-year provision offers a useful margin of safety. (CSG) (2) Limiting eligibility to five years is not unreasonable. However, it should be clarified if this time frame refers to a calendar period immediately following project implementation. (RJA)

RESPONSE: DEP has retained the seven-year average useful life for EEPs that was proposed in the draft rule. It has clarified that the seven years during which an EEP must request PBSA allowances must be consecutive and start immediately following the implementation of the project.

- *Whether DEP should allocate allowances for energy generated or saved before 2002, and if so, on what basis and for what length of time.*

See discussion above in Section C – Qualifying Projects – Start Year.

- *Whether DEP should allow the aggregation of projects that individually equal less than one whole allowance.*

COMMENT: (1) Aggregation is essential. (CSG) (2) Supports aggregation. (RJA)

RESPONSE: DEP agrees and has retained the aggregation provision in the final rule.

- *Whether owners of privately funded energy efficiency projects should be required to have a CPA, PE, architect or other independent third party sign off on the quantification of energy saved as part of the request for allowances.*

See discussion above in Section K – Certification.

- *Whether DEP should include other standard methodologies for quantifying energy saved.*

See discussion above in Sections E through I - Quantification.

Q. CAVEAT REGARDING USE OF ALLOWANCES BY REPS

Since the issuance of the draft regulation, DEP has been advised of concerns about the potential overlap between the use of PBSA allowances and other programs relating to the generation and sale of renewable energy. In a Union of Concerned Scientists briefing paper² provided to DEP (but not submitted as a formal comment), the author notes that many of the programs and institutions supporting the green power industry consider renewable energy generators who have sold their allowances to be ineligible for a green power designation. The briefing paper reports that the National Association of Attorneys General's Environmental Marketing Guidelines for Electricity³ provide that the sale of green power from renewable resources that have sold off emission allowances would mislead customers as to the benefits they expect when purchasing green energy. The briefing paper cites reports and proceedings of other organizations that have taken similar positions; these include the National Association of Regulatory Utility Commissioners, the Center for Resource Solutions, the National Wind Coordinating Committee, and the Green-e Green Power Certification program. In addition, this issue has been raised in proceedings to establish Renewable Portfolio Standards (RPS) in the states of Rhode Island, New York and California.

The Department recognizes that there are other incentive programs for renewable energy and that there is the potential for renewable energy projects to benefit from more than one "green energy" incentive or marketing program. Nevertheless, through the PBSA program, the Department seeks to create an additional financial incentive for the development of renewable energy, provided that it is consistent with existing consumer protection and energy laws.

While there is no prohibition in Massachusetts against a REP obtaining both RPS certificates and PBSA allowances under the applicable Massachusetts regulations, allowance holders should be aware of these issues concerning the use of both certificates and allowances and the marketing of "green" energy. Allowance holders should take note of the need to comply with the statutes and regulations cited at 310 CMR 7.28(6)(b)11.f. (Relationship to Other Laws). These include M.G.L. c. 93A, (regarding the Regulation of Business Practices for Consumer Protection); M.G.L. c. 164, (regarding the Manufacture and Sale of Gas and Electricity); 940 CMR 19.00 et seq., the regulations of the Office of the Attorney General regarding the Retail Marketing and Sale of Electricity, and 220 CMR 11.00 et seq., the Rules of the Department of Telecommunications and Energy Governing the Restructuring of the Electric Industry.

² *Ensuring the Integrity of Renewable Energy Accounting: Making Set-Aside Emission Allowances for Renewable Energy Compatible With the NEPOOL Generation Information System*, Union of Concerned Scientists Briefing Paper; prepared by Robert C. Grace, Sustainable Energy Advantage, LLC. May 15, 2003

³ *Environmental Marketing Guidelines for Electricity*, National Association of Attorneys General, Environmental Marketing Subcommittee of the Energy Deregulation Working Group, December 1999.